# EXHIBIT E

Brief of Defendant-Respondent Mercy Hospital,
Anderson v. House of Good Samaritan Hosp., 2003 WL 25707980

2003 WL 25707980 (N.Y.A.D. 4 Dept.) (Appellate Brief)
Supreme Court, Appellate Division, Fourth Department, New York.

Michelle ANDERSON, Plaintiff-Appellant,

v.

HOUSE OF THE GOOD SAMARITAN, Mercy Hospital of Watertown, d/b/a Community Health Center, Maritza Santana, M.D., David T.gavan, M.D., Jane L. Hyland, M.D., and Philip Tatnall, M.D., Defendants-Respondents.

No. 2003-01298.
May 14, 2003.

**Brief of Respondent**

Conboy, Mckay, Bachman & Kendali, LLP, Stephen Gebo, Esq. Of Counsel, Attorneys for Defendant, Mercy Hospital, 407 Sherman Street, Watertown, NY 13601, 315-788-5100.

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## *1 PRELIMINARY STATEMENT

Plaintiff sought additional discovery in a medical malpractice action more than six years old and appeals from the lower court's order limiting her request. Defendant, Mercy Hospital, claims that the Court properly exercised its discretion by ruling that defendant need not provide a copy of its insurance policy when it had disclosed its policy limits and had stated there were no applicable reservations, exclusions, or limitations on coverage. Defendant also claims that the lower court properly directed an in camera review of documents relating to the employment of various physicians. The Court was properly protecting confidential and proprietary information of no relevance to the case.

## *2 QUESTIONS PRESENTED

1. Are the defendants obligated to provide copies of their entire insurance policies when they had disclosed their policy limits and there were no restrictions of coverage?

The lower court ruled they were not so obligated.

2. Were the defendants required to disclose information about the employment status of physicians who were members of the United States Army and who were not alleged to be negligent?

The lower court ruled they were not.

3. Was the lower court entitled to conduct an in camera review of documents relating to the employment status of other physicians to protect against the disclosure of proprietary, financial, or privileged information?

The lower court ruled that it was.

## *3 STATEMENT OF FACTS

This is a medical malpractice action in which the plaintiff claims that the defendants misdiagnosed a rare neurological disease. (R. 22.) The action began in 1996. There has been extensive discovery. The parties have conducted over twenty depositions throughout the United States. (R. 12.) The plaintiff has deposed seven treating physicians, as well as virtually all of the administrative personnel involved in the operation of the mental health unit in which she was a patient. (R. 21.)

More than six years after commencement of the action, plaintiff moved for additional discovery. More specifically, she sought complete copies of the defendants' insurance policies, all contracts and documents showing the employer and staff status of various physicians, and the depositions of additional administrative personnel and physicians. (R. 14-19.)

The defendant, Mercy Hospital, objected in part to the plaintiffs demands. It declined to provide a copy of its entire insurance policy because it was confidential and contained numerous provisions, riders, limitations, and exclusions, none of which were relevant to this case. (R. 20.) Mercy had previously disclosed its policy limits of one million dollars and was making no claim that any limitations or exclusions were applicable. (R. 20.) All of the other defendants had disclosed their insurance coverage, and there was more than six million dollars in coverage available to the plaintiff. (R. 10.)

***4** Mercy also objected to the production of documents about the staff status of six physicians. Mercy had already admitted that it employed Dr. Santana and Dr. Gavan (who has since been dismissed from the case). Dr. Tatnall and Dr. Hyland were employed in the emergency department of Samaritan Medical Center. Dr. Soncrant and Dr. Dorman were physicians in the United States Army. They are not defendants in the case, and there is no claim that they were negligent or that Mercy was somehow responsible for their actions. (R. 21.)

  

The lower court ruled that the plaintiff was not entitled to copies of the defendants' insurance policies. The Court noted that the defendants had disclosed their policy limits, that there was over six million dollars in coverage, and that the plaintiff had no need for the actual policies until and unless she obtained a favorable verdict. (R. 10.)

The Court also ruled that the plaintiff was not entitled to information regarding the staff status and privileges of Drs. Soncrant, Dorman, and Gavan. Dr. Soncrant and Dr. Dorman were Army physicians not alleged to be responsible for plaintiff's injury, and Dr. Gavan had been dismissed from the case in a separate decision. (R. 11.) The Court directed that the defendants disclose documents relating to the employer/staff status of Drs. Tatnall, Hyland and Santana for an in camera review to protect any proprietary or privileged material. (R. 11.) The defendants have provided this information to the Court, but Mercy Hospital has no knowledge what information the Court gave to the plaintiff.

***5** Finally, the Court ruled that the plaintiff could take additional depositions of the doctors and administrators. However, due to the number and cost of prior depositions, the Court ruled that future depositions must take place within the Fifth Judicial District. (R. 12-13.)

## ARGUMENT

## POINT I

## CPLR § 3101(F) DOES NOT EXPRESSLY PROVIDE THAT PLAINTIFF IS ENTITLED TO THE DEFENDANT'S ENTIRE LIABILITY INSURANCE POLICY

According to CPLR § 3101 (f), "a party may obtain discovery of the existence and contents of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment." N.Y. C.P.L.R. § 3101 (McKinney 1991). The purpose of this provision "was to accelerate settlement of claims by affording the plaintiff knowledge of the limits of defendant's liability policies." *Russo by Russo v. Rochford,* 123 Misc.2d 55, 68, 472 N.Y.S.2d 954, 964 (Sup. Ct. Queens Co. 1984), citing (Siegel, N.Y. Prac., §344, p. 402; 1975 N.Y. Leg. Annual, p.65). Further, a party will be entitled to a protective order upon "demonstrating that the requested materials were privileged or otherwise not discoverable." *PCB Piezotronics. Inc. v. Change,* 179A.D.2d 1089,580 N.Y.S.2d 901 (App. Div. 4th 1992). CPLR § 3101(a) requires "full disclosure of all matters material and necessary in the prosecution or defense of an action," N.Y. C.P.L.R. § 3101 (McKinney 1991).

***6** Plaintiff claims that disclosure of the defendant's entire liability insurance policy is required by CPLR § 3101(f) and settled decisions of this court. However, plaintiff has failed to provide any authority that such a clear cut rule exists either in this Court or in the other Appellate Divisions. In fact, the decisions permitting disclosure of the entire policy have been granted in particular instances where additional information was required to ascertain the actual existence of a policy to cover a defendant or where the recovery under a specific policy could be limited because of payments of prior claims. *Spraygue v. International Business Machines Corp.,* 120A.D.2d 514,515,501 N.Y.S.2d 712 (App. Div. 2nd 1986), and *Kimbell v. David,* 81 A.D.2d 855, 855-856, 438 N.Y.S.2d 860, 861 (App. Div. 2nd 1981), both cited by *PCB Piezotronics. Inc. v. Change,* 179 A.D.2d 1089, 580 N.Y.S.2d 901 (App. Div. 4th 1992). Neither of these particular concerns are raised or present in this case.

There are several cases where courts have denied requests for copies of entire insurance policies. In *Morris v. Clements,* the court denied "plaintiff's demand for unredacted copies of defendants' medical malpractice insurance policies." *Morris v. Clements,* 228 A.D.2d 990,991,644 N.Y.S.2d 850 (App. Div. 3rd 1996). Lower courts have held that "a statement under oath containing such information as he may require addressed to the existence and contents of the subject insurance policy," would satisfy compliance with the CPLR § 3101(f). *Hernandez v. Jones,* 84 Misc.2d 805, 806-807, 376 N.Y.S.2d 402,403 (Sup. Ct. Queens Co. 1975), and *Russo by Russo v. Rochford,* 123 Misc.2d 55, 68, 472 N.Y.S.2d 954, 964 (Sup. Ct. Queens Co. 1984).

***7** The plaintiff claims that she needs the entire policy so that she can "protect her rights of recovery." (R. at 16, Affidavit of Plaintiff's Attorney, para. 2(a)(i). Generally, the disclosure of material for purposes of recovery is permitted when liability has been determined rather than for trial or settlement purposes. N.Y. C.P.L.R. § 5223. Because the plaintiff has admittedly requested the policy for the purpose of recovery and not because it will lead to admissible proof, the policy of allowing liberal discovery, as granted in *Melius v. General Motors Corp.*, should not be applied to this request for the defendant's entire liability insurance policy. *Melius v. General Motors Corp.*, 267 A.D.2d 1087, 700 N.Y.S.2d 916 (App. Div. 4th 1999), citing *Twenty Four Hour Fuel Oil Corp. v. Hunter Ambulance Inc.*, 226 A.D.2d 175, 640 N.Y.S.2d 114 (App. Div. 1st 1996).

The Court of Appeals has held that "the grant or denial of discovery is a discretionary matter," and the scope of review "is limited to determining whether the courts below had the power to deny discovery and, if so, whether that discretionary power was abused." *Hirschfeld v. Hirschfeld,* 69 N.Y.2d 842,844 (N.Y. 1987). In this case, the lower court considered the defendant's arguments including "that the policy contains numerous provisions, riders, limitations, and exclusions none of which are relevant to this case," (R. 20) and that "the policy is deemed confidential." (R. 20.) The Court also noted that "the counsel for the various defendants have stated the insurance coverage contained in each defendant's policy." (R. 10.) The lower court held that because "plaintiff has failed to provide any reason that the information supplied by the defendant's ***8** counsel is incorrect or unreliable," there is "no reason or need for plaintiff to have copies of the insurance policies," until recovery becomes necessary. (R. 10.)

Based on the foregoing, the lower court did not abuse its discretion by denying plaintiffs request for the defendants' entire liability insurance - olicy and ordering only that the defendants disclose their policy limits.

## POINT II

## THE PLAINTIFF IS NOT ENTITLED TO INFORMATION CONCERNING DR. SONCRANT AND DR. DORMAN

All parties acknowledge that Dr. Dorman and Dr. Soncrant were physicians in the United States Army at the time of the alleged malpractice. (R. 11,21.) Accordingly, they could not possibly have been employees of either Samaritan Medical Center or Mercy Hospital. In addition, the doctors are not defendants in the action, and the plaintiff does not claim that they were negligent. As a result, it is irrelevant whether they had staff privileges or not.

Plaintiff tries to claim (at pages 6 and 7 of her brief) that Dr. Soncrant signed a certificate of involuntary confinement of psychiatric patients. The plaintiff claims, in somewhat conclusory fashion, that Samaritan Medical Center confined the plaintiff based upon Dr. Soncrant's certification, that Samaritan wrongly did so if Dr. Soncrant was not a staff physician, and that his staff status is an important issue in the case.

***9** Plaintiff's argument is without merit. First of all, there is no support in the record for the statement that Samaritan confined the plaintiff on the basis of Dr. Soncrant's certification. More fundamentally, plaintiff's claim is for medical malpractice resulting from misdiagnosis and not a claim for false imprisonment. No one claims that the plaintiff did not need to be hospitalized; the dispute is whether it was malpractice to treat her for depression rather than for a neurological disease.

Plaintiff next argues (at p. 7 of her brief) that Dr. Dorman was a consulting physician who may be claimed (it is unclear by whom) to have played some unspecified role in the transfer of the plaintiff to Walter Reed Army Hospital. The plaintiff goes on to claim, without stating why, that Dr. Dorman's relationship to Samaritan is important to these activities.

  

There is no logic to plaintiff's argument. Aside from the fact that plaintiff is relying, at least in part, on arguments that haven't yet and may not ever be made, the plaintiff fails to explain why the status of a physician who is not claimed to have been negligent has any relevance at all.

## POINT III

## PLAINTIFF IS NOT ENTITLED TO ANY ADDITIONAL INFORMATION REGARDING THE STAFF STATUS OF DR. TATNALL, DR. HYLAND, AND DR. SANTANA

Plaintiff next objects to the Court's requirement that the defendants disclose information regarding the employer/staff status of Dr. Tatnall, Dr. Hyland, and Dr. Santana for in camera review. Plaintiff claims that the information is not privileged.

***10** The plaintiff's application is premature. The defendants disclosed all of the required information to the Court. Mercy Hospital does not know what the lower court did with that information, and plaintiff does not disclose that fact in her brief. The lower court may well have found none of the information was privileged and may have turned it all ovei to the plaintiff. The plaintiff does not claim in her brief that there was any information the Court has refused to turn over.

Moreover, it was appropriate for the lower court to require an in camera review to protect proprietary, financial, or privileged information. Such protection was especially appropriate because Mercy had admitted that Dr. Santana was its employee (R. 21), and Samaritan Medical Center had admitted that Dr. Tatnall and Dr. Hyland were employed in its emergency department. (R. 21, 34.) The doctors had also testified about their employment status in the course of their depositions. (R. 34). The plaintiff has shown no need for such potentially confidential information as the details of their working relationship (such as hours or vacation timc) or the physicians' salary. In camera review was also appropriate because information concerning credentialing is privileged quality assurance material. See, *Logue v. Velez,* 92 N.Y.2d 13, 677 N.Y.S.2d 6 (1998).

## CONCLUSION

Plaintiff has pursued extensive discovery for more than six years. For the reasons set forth above, she has shown no need for any discovery in addition to that permitted by the lower court, and the Court was within its discretion in limiting the plaintiff's demands.

The lower court order should be affirmed.

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